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IN THE

Supreme Court of the United States

No. 475. Petition not printed

October Term, 1947.

JOHN BRUSZEWSKI,

Petitioner,

v.

ISTHMIAN STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

THOMAS E. BYRNE, JR.,
Counsel for Respondent.

JOHN B. SHAW,
ROWLAND C. EVANS, JR.,
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TABLE OF CASES CITED.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The Petitioner in his Brief refers to the case as one which vitally influences the rights of longshoremen and seamen. Apparently he refers to seamen who are members of the crew of a vessel. It is difficult to find support for that statement in this case. Both the Courts below treated the case as one involving an injury to a longshoreman or shoreworker temporarily on board a ship. The reference to it in Petitioner's Brief was the first inkling the Respondent had that the case in any way involved the rights of members of the crew. A study of the Record before this Court will, we think, bear out our assertion that this case is the case of a longshoreman; that its facts are so unique as to place it in a class by itself and it clearly is one which does not even remotely affect seamen engaged as members of the crew of a vessel. This Court will search the Record here in vain for any evidence, either in the testimony or in the opinions of the lower Courts, that there is anything in this case

which would affect, even remotely, the rights of the so-called "Wards of the Admiralty."

Petitioner asks this Court to grant certiorari to review a decision by the Circuit Court of Appeals for the Third Circuit which affirmed the decision of the District Court upon Motion for a new trial after the Trial Judge had granted Defendant's Motion for binding instructions.

Stripped of much wordiness, the petition seeks to have this Court hold that where there has been an injury to a shoreworker who has been brought on board a ship for the sole purpose of removing the wreckage of a boom which broke while being used by his fellow employees (as distinguished from members of the crew of the vessel), there is nevertheless a warranty that the broken boom and its appurtenant parts are seaworthy so as to entitle the Petitioner to recovery for his injury upon the so-called "warranty of seaworthiness." *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 66 S. Ct. 872. Of this contention the District Court has said (66 F. Supp. 210 at 213):

> "Here, it would be a contradiction in terms, to say that there was a warranty of seaworthiness of the instrument occasioning the injury, when the instrument was a broken boom, the repair of which was the only reason for plaintiff being on the vessel at all."

Of the same contention, the Circuit Court of Appeals said (116 F. 2nd 720 at 722):

> ". . . no warranty of seaworthiness existed here. Logically construed, liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy. *To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms.*" (Emphasis ours.)

The decision of the Circuit Court of Appeals is not in conflict with any decision in any other Circuit. This is made abundantly plain by the fact that the Circuit Court here cites and relies strongly upon the case of *Byars v. Moore-McCormack Lines, Inc.*, 155 F. (2d) 587, decided by the Circuit Court of Appeals for the Second Circuit. Both decisions involve persons in the same category—shore workmen brought on board a ship in connection with needed repairs and both cases were decided after the decision by this Court in *Seas Shipping Co. v. Sieracki, supra.*

The reasoning of this Court in *Seas Shipping Co. v. Sieracki, supra,* is not even remotely applicable here. In that case, 328 U. S. at 95, this Court referred to the fact that Sieracki's employer had "*neither the right nor opportunity to discover or remove the cause of the peril* and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in *cases where the perils are obvious or his own action creates them.*" (Emphasis ours.)

In our case the work of loading the vessel was being done by stevedores employed by B. H. Sobelman & Co., hereinafter referred to as Sobelman. While they were using one of the booms it broke. It could have readily been broken because of overloading or improper operation on the part of the stevedores. It could have been due to a defect in the boom. Be that as it may, it was under the sole control of the stevedores when it broke. Thereafter Sobelman procured a group of men from on shore who were brought aboard for the sole purpose of removing the wreckage. Necessarily that was not just a piece of wood or steel. It included also the guys, blocks, lines and rigging which made it a boom (R. 47). Petitioner was *not* one of the longshoremen engaged in loading the ship. He was one of the crew brought from ashore for the sole purpose of removing the wreckage which was part and parcel of the work

necessary to put up a new boom. It is obvious that Petitioner did not in fact rely upon any "warranty of seaworthiness" as to this wreckage and all that the Circuit Court of Appeals has held is that under such facts there was no such warranty as would entitle Petitioner to base a recovery upon it.

Negligence.

When the Petitioner for a Writ of Certiorari has a dissenting opinion in the Circuit Court of Appeals (even though it is only a dissent on Petition for Rehearing) it would certainly be expected that he would follow the reasoning of the dissenting Judge in applying for Certiorari. We call the attention of the Court to the fact that he does not. Judge Biggs, dissenting, thought that this case was one calling "for the application of the doctrine of res ipsa loquitur." 163 F. (2d) 720 at 723. Petitioner does not press the point in his Brief. That is probably because it is abundantly clear from the very definition of the doctrine that it can be applied only where the instrumentality is under the sole control of the Defendant. The facts here do not show sole control in the Defendant. Sobelman's employees had at least partial control (R. 48, 49, 51, 52, 53, 26, 35, 154, 161) even though we grant to Petitioner every favorable inference that can be drawn from all the facts favorable to him. Isthmian did not have possession and control of the vessel to the exclusion of Sobelman or the shipowner, United States of America, *Caldarola v. Eckert*, 67 S. Ct. 1569.

Petitioner's argument with respect to the claim of negligence is not supported by the Record. Even Judge Biggs, dissenting, does not say that Petitioner made out a case of negligence for submission to the jury. He based his dissent upon the doctrine of res ipsa loquitur, but the Petitioner does not make his argument here on that ground. We will discuss Petitioner's argument on negligence but briefly.

This for the reason that the case was not tried on that basis and negligence was only a sort of "backstop" or "make-weight" argument in the Circuit Court.

Petitioner quotes many cases in his Brief which stand for the proposition that a shipowner or one in the position of shipowner owes to a stevedore the duty to use reasonable care to provide him with a safe place in which to work. We concede that to be the law.

The Record before this Court shows that when Petitioner and his fellow employees came aboard the vessel the boom was broken. "Everything was broken loose" (R. 16a) —"These guys break on top" (R. 17a). In order to clear away the wreckage another and sound boom located within working distance was used. Apparently the charge of negligence is that no one on behalf of the Respondent climbed aloft into this mass of broken and tangled gear to "inspect" it. Certainly if Respondent had ordered anyone to climb up into this wreckage this Court or any Court would be warranted in condemning such an order as reckless and without regard to the safety of the man sent aloft. Petitioner would put Respondent to Hobson's choice and ask the assistance of this Court in so doing. In short, Petitioner would have this Court hold that it was negligence on the part of Respondent that it did not risk the life or limb of some crew member by sending him aloft into the wreckage to make sure that none of the Sobelman employees would be injured should one of them be so careless of his own safety as to walk under the wreckage while it was being moved (R. 17, 18, 66). There is literally no evidence nor any inference which can be drawn from the evidence that it would have been in any way possible to inspect this wreckage 25 or 30 feet in the air. That is the duty the Petitioner now claims was breached by Respondent. It was manifestly impossible for anyone to make such an inspection and it therefore cannot be said that any duty of "reasonable care" was breached.

The Petition for Certiorari.

The Petition in this case sets out five points. We think we have demonstrated that while we in no way dispute the law of the cases which are cited by Petitioner in support of his first and second points, we see absolutely no connection between the present case and the law of those cases.

We cannot by any stretch of the imagination read into the Opinion of either of the Courts below anything which would warrant the Petitioner's third point. The Petitioner states that under the decision of the Court of Appeals the warranty of seaworthiness must be based upon some contract or agreement between the parties. It is unnecessary for us to attempt to interpret the perfectly clear language of the Court below. The Circuit Court did not base its decision upon any such theory.

The Petitioner's fourth point argues that there are contradictions within the Opinion of the Circuit Court and that the Court would preclude the jury from drawing all reasonable inferences from your evidence. We point out to this Court that the Petitioner has failed to document those portions of the Opinion which he claims to be inconsistent. We have no quarrel with the statement that a jury may draw any and all reasonable inferences from the evidence. The point is that the inferences must be drawn from the evidence. We see no conflict between the rule laid down in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333; 53 S. Ct. 391 and the Opinion of this Court in *Lavender v. Kurn*, 327 U. S. 645.

We think that we have heretofore demonstrated that the Petitioner's fifth point is unsound because there is no question of any "consensual arrangement" in this case. Neither the District Court nor the Circuit Court even hinted at any such holding.

Respondent's Second Defense.

The Court below did not find it necessary to reach the question of the responsibility of Respondent which acted as

agent for the United States, the shipowner. The only relationship of the Respondent with this vessel was that it acted as "husband" under the contract of General Agency with which this Court is already quite familiar, *Caldarola v. Eckert, supra, Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 S. Ct. 1218.

The contract, the shipping articles of the vessel and other exhibits are not printed in the Record before this Court although they are in evidence in the case (R. 7, 150).

Even should this Court agree with Petitioner on the questions of negligence and the warranty of seaworthiness, the judgment below could not be reversed, we think, unless this Court was to reverse its own recent decision in *Caldarola v. Eckert, supra.* Respondent here was not the shipowner. Sobelman, Petitioner's employer, was performing work aboard the ship under a contract with the United States (R. 141).

Conclusion.

We respectfully submit that there was no error in the Court below. The decisions of both the District Court and the Circuit Court of Appeals are founded upon sound legal principles and practical judgment. There is nothing to which Petitioner can point in this case which is of national importance and there is no conflict between the decision of the Circuit Court and any other decision either of this Court or of another Circuit Court. We submit that the Petitioner has not shown valid cause why a Writ of Certiorari should issue and the Respondent prays that the Writ shall be denied.

Respectfully submitted,

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